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No. 71-802

UNITED STATES OF AMERICA

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

JOSEPH BARBARA, JR.,

Petitioner,

vs.

PERRY JOHNSON, WARDEN, of the State Prison of Southern Michigan,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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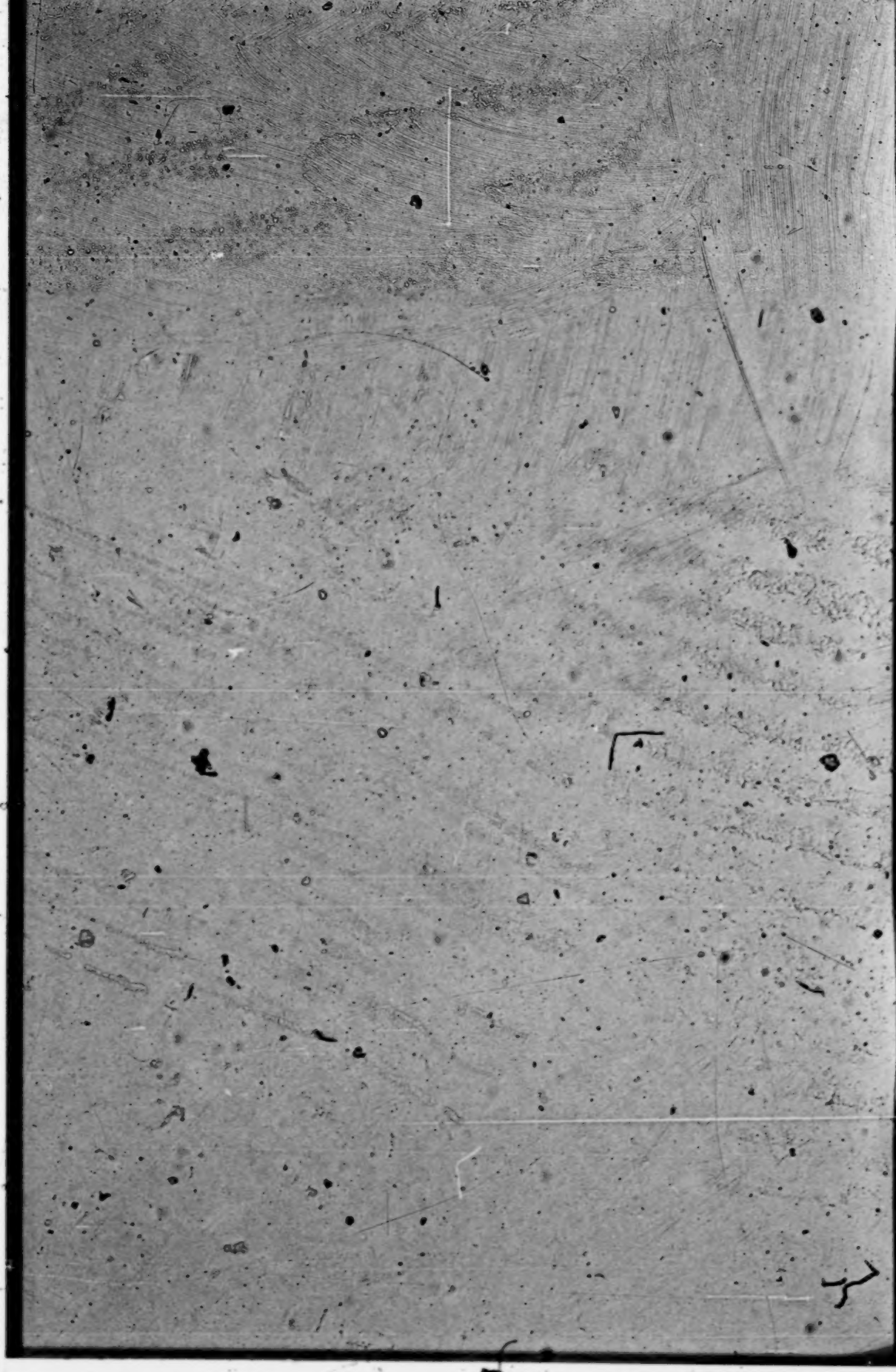
PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN — 1971



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COUNTERSTATEMENT OF QUESTION PRESENTED

DID THE INTERJECTION BY WITNESS PETER LAZAROS OF EXTRANEOUS MATTERS, IN THE PRESENCE OF JURY, IN RESPONSE TO QUESTIONS ASKED BY DEFENSE COUNSEL UPON CROSS-EXAMINATION, DEPRIVE PETITIONER JOSEPH BARBARA, JR., OF A FAIR TRIAL IN HIS STATE COURT PROSECUTION WHEREIN HE WAS CHARGED WITH EXTORTION OF MRS. PETER (DELORES) LAZAROS?

The Trial Judge said "NO"

The Michigan Court of Appeals said "NO"

The United States District Court said "YES"

The United States Court of Appeals said "NO"

The State contends that the answer should be "NO"

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COUNTERSTATEMENT OF THE CASE

The State of Michigan accepts the Petitioner's Statement of the Case.

ARGUMENT

THE PROSECUTION WITNESS'S UNRESPONSIVE, IRRELEVANT, SPONTANEOUS, AND VOLUNTARY ANSWERS, ELICITED BY DEFENSE COUNSEL UPON CROSS-EXAMINATION, WHICH IMPLIED THAT DEFENDANT AND HIS ATTORNEYS WERE CONNECTED WITH THE MAFIA WERE NOT SO INHERENTLY INFLAMMATORY OR SO PREJUDICIAL

AS TO CAUSE REVERSIBLE ERROR WHERE THE TRIAL COURT SUFFICIENTLY INSTRUCTED THE JURY TO DISREGARD SUCH UTTERANCES, THUS CURING THE POSSIBILITY OF PREJUDICE TO DEFENDANT.

In his opinion, the District Judge stated:

> "...The fact that a witness volunteers an improper or irrelevant answer should not become grounds for reversal, absent a showing that the unauthorized remark affected the substantial rights of the accused ..." (Petition, 45).

Thus, the question presented below, as here, was whether substantial rights of the petitioner were prejudiced by the unresponsive answers elicited by defense counsel on cross-examination. The Michigan Court of Appeals held that the trial court's instructions had cured the possibility of prejudice. The District Judge disagreed and held that no instruction could have cured the possibility of prejudice in this trial. The United States Court of Appeals for the Sixth Circuit reversed and specifically held that "even if the challenged testimony could be deemed prejudicial, its effects were cured by the cautionary instructions of the court." (Petition, 54).

In the context of *this* trial, when viewed in light of the trial judge's instructions, the State contends that the unresponsive remarks were neither reversible error nor a ground for the granting of habeas corpus. The State, in this appeal, relies primarily upon the cogent and clear reasoning of Judge John W. Fitzgerald, Chief Judge Pro Tem of the Michigan Court of Appeals, in his opinion in this cause. See, *People v. Joseph Barbara, Jr.* (1970), 23 Mich App 540. The State further contends that Judge

Fitzgerald's approach and reasoning is also the Federal approach as stated in the opinion of Chief Judge Phillips in *United States v. Rubino* 431 F.2d 284 (6 Cir. 1970), and as adopted by the Ninth Circuit in *United States v. Ruby Lazarus*, 425 F.2d 638 (9 Cir. 1970).

The nature of the issues presented in this appeal require a somewhat unorthodox approach to the matter. The facts of the events are basically agreed upon. The dispute in this case concerns the legal consequences of those facts. In the first 5 pages of his opinion, the learned District Judge stated — without citation of authority — his view of the law on this question. The State of Michigan has no specific exception to the law as stated by the judge. Rather, the thrust of this appeal is at the application of that law — as stated by the judge — to these facts. Quite obviously, if faced with the situation here involved *while sitting as a trial judge,* Federal Judge Kaess would have granted a mistrial. But Judge Kaess was *not* the State trial judge — his scope of review was rather that of a Federal judge examining a State court record to determine if the State trial judge had violated the Constitution of the United States in refusing to grant a mistrial. The State trial judge who had observed the incident in question — and who could hear the inflection of the voices and observe the demeanor, facial and hand expressions — ruled that a proper instruction to the jury was sufficient to protect the rights of the accused. On this appeal, it is the position of the State of Michigan that in so ruling the State trial judge did not violate any Federally protected right of the accused.

Opinion of the State Trial Judge

In denying the motion for a mistrial, the State trial judge said (Tr 228-229):

"...

"Concerning the motion for a mistrial, concerning the use of the word 'Mafia' by the witness, Peter Lazaros, the issue, as I see it, is whether the use of that word has so prejudiced this jury, that this defendant cannot receive a fair trial.

"I've carefully considered this motion for a mistrial. I've had the reporter re-read the question and answer, and, in my opinion, there's no question it would have been better had that word been left unsaid, and there's no question that, through counsel, I have told counsel to tell the witnesses not to use that word unless it's in direct response to their questions — again, I say it certainly would have been better if that word had not been said, but that whole answer to that whole question has been stricken from the record, and the jury has been ordered to disregard the whole answer. I purposely gave no reason to the jury, because that would just emphasize what we were talking about. And this word that we're concerned with has not been emphasized before this jury.

"This Court is of the opinion that the action of this Court in striking the answer, in my opinion, has protected the rights of this defendant. I'm satisfied that this jury will follow the Court's instructions. And I did not refer, specifically, to that word. I referred to the whole answer, which was a long answer.

"This Court is of the opinion that although it would have been better had this word been left unsaid, nevertheless, its use has not so prejudiced this trial that this defendant could not receive a fair trial. And, on the contrary, this Court has made and will make every effort to guarantee a fair trial to this defendant.

"For the foregoing reasons, the motion for mistrial is denied."

Opinion of the Michigan Court of Appeals

In reviewing this action of the State trial judge, the Michigan Court of Appeals said:

"....

"Several issues are raised on this appeal; the first concerns the question of whether the continuous injection by witnesses Peter and Delores Lazaros of extraneous matters in the presence of the jury deprived defendant of his right to a fair trial by an impartial jury. The allegedly prejudicial matters concern references made which imply that defendant and his attorneys were connected with the 'Mafia', thus inferring a guilt by association. Defendant argues that in light of the remarks made, the judge's instructions to the jury, striking all references to the above subject, were not sufficient because of the inflammatory nature of these utterances.

"The people argue that defendant's attorneys deliberately phrased questions which were calculated to bring out references to the 'Mafia', thus inviting error for purposes of having a mistrial declared.

"In *People v. Wolke* (1968), 10 Mich App 583, this Court addressed itself to questionable evidence injected into a trial. The Court discussed the question of when objectionable evidence will be held to so prejudice a jury that a new trial must be granted. In analyzing the applicable authorities, it was found that two standards exist; namely, that once a prejudicial remark is made, the 'ink spot' may not be blotted from the minds of a jury by express instructions. On the other hand, recognition was also given to a line of cases which presumed that a jury considers only the testimony permitted by a court to stand. This Court held that the choice of which standard to apply ultimately rests upon the degree of prejudice generated by the objectionable evidence. Only if the testimony is inherently prejudicial or inflammatory will there be an 'ink spot' on the minds of the jurors which cannot be erased. In the case at bar, we are dealing with unresponsive, irrelevant, and spontaneous answers volunteered by two witnesses. In 2 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 600, p 778, it is stated:

> " 'Error cannot be predicated upon the fact that a witness gives an improper or irrelevant answer where the question was a proper one and neither the court nor counsel was at fault. Improper testimony offered by a witness and promptly struck out by the court on objection is not reversible error. *** A witness cannot put error into a case by an unauthorized remark, neither called out by a question nor sanctioned by the judge; and if what he says or does improperly is likely to do much mischief, it is presumed that the judge will apply the proper corrective measures in his instructions if requested to do so.'

"A review of the problem with which we are faced leads to the inescapable conclusion that if error could be easily predicated on the improper utterances of a witness,. it would be most difficult ever to conduct a proper trial. *People v. Droste* (1910), 160 Mich 66.

"Unresponsive answers, irrelevant in nature alone, are not sufficient to cause reversible error. The instructions to disregard the utterances made were quite sufficient to instruct the jury on those matters not properly before them and cured the possibility of prejudice to defendant."

Opinion of the United States District Judge

In granting a writ of habeas corpus to this State prisoner, the Court said (29a-33a):

"...

"... improper testimony is presumed to be cured by judicial instruction, except when the objectionable testimony is inherently prejudicial or inflammatory.

"...

"... the transcript does show that the trial, for the parties and witnesses, was an emotional affair involving extortion from and the rape of a man's wife by an alleged close friend of the husband, while the husband was in prison. In an emotional trial of this nature spontaneous, unresponsive statements are extremely likely, if not imminent...

"... Despite the temperamental nature of the prosecution witnesses and the knowledge of their alleged association with the Mafia, the defense counsel on cross-examination proceeded to question these witnesses about certain incidents in which they, as members of the Mafia, had supposedly been involved. At times the repeated probing by defense counsel into these collateral matters resulted in heated exchanges between himself and the prosecution witnesses. Clearly, it is arguable that, in light of this antagonistic cross-examination, the petitioner may have invited error and may be at least partially responsible for any prejudice that may have survived the instructions of the trial court.

"... In the case at bar we are not reviewing the conduct of an over-zealous government prosecutor or unauthorized remarks elicited by the government during direct examination of one of its own witnesses. Rather, the petitioner in this action is seeking the declaration of a mistrial because his cross-examination of the government's witnesses brought to jury that which the court had purposely attempted to exclude.

"...

"In this case, prior to the witnesses taking the stand, the court specifically had them instructed as to the impropriety of such testimony. Further, the record reflects that in the wake of the court's sustaining a defense objection and cautioning the jury, the prosecution witness persisted with additional references to 'these people,' 'your people,' and 'them,' thus paying no heed to the court's ruling. Clearly this indicates more than a mere slip-of-the-tongue refer-

ence to the 'Mafia.' It is more than an emotional response resulting from intense cross-examination. And, more importantly, it is more than could be cured by *any* trial court's instructions to the jury."

In the context of these conflicting rulings lies the focal point of the inquiry. The State courts, in substance, held that the remarks of witness Lazaros, while certainly objectionable, were not a sufficient basis for a mistrial if proper precautionary instructions were given. Implicit in the approach of the State courts is the view that repeated probing by defense counsel into collateral matters involving the Mafia had precipitated the offensive remarks. The District Judge, on the other hand, felt that these unresponsive answers were "more than an emotional response resulting from intense cross-examination." (Petition 47). As correctly noted by the Sixth Circuit, there is no foundation in the record for the District Judge's finding.

The State contends that the District Judge disregarded several extremely important aspects of the cross-examination of this witness. The entire colloquy at issue is reproduced below. We would stress at the outset that the trouble began *when defense counsel asked the witness about* an alleged bribe paid to Federal officers and to the Mayor of Detroit — a matter wholly collateral to the case being tried and a matter *which was without any foundation or reference whatsoever in the record of this case.* Defense counsel was obviously probing for a reference to the "Mafia" and when he got what he wanted, he promptly "grand-standed" by moving for a mistrial in the presence of the jury. It should also be noted at the outset that the witness (who had been instructed not to use the word "Mafia" unless specifically asked a question which involved the necessity of so answering) was at first eva-

sive — defense counsel had to literally drag the answer out of him (Tr 171-Tr 175):

"Q. All right. Isn't it true that you've made other accusations against Mr. Barbara, other than the accusation here made by your wife?

A. *What you mean by that? Will you explain to me?*

Q. Yes, I'll be happy to. Isn't it true that you have made a statement or statements, to certain law enforcement agencies, that at the Kingsley Inn, on or about December the 17th of 1967, Mr. Barbara paid a bribe, not only to certain Internal Revenue agents, but also to Mayor Cavanagh of the City of Detroit?

A. Let me say this to you, while you want to know, Mr. Barris, Mr. Barbara, at that time he delivered the money, representing the Mafia, to give —

MR. BARRIS: All right, your Honor, I move for a mis-trial.

A. *You asked me.*

MR. BARRIS: I didn't ask for that at all, your Honor, I want to excuse the jury.

THE COURT: Escort the jury into the juryroom.

(Jury leaves the courtroom)

THE COURT: The record may show the jury is not in the courtroom.

MR. BARRIS: Your Honor, the question I asked him could have been answered yes, no, or I don't remember. Here, Mr. Lazaros, for obvious reasons, injected the Mafia. Here, again, it isn't Mr. Bain's fault, he can't control this man and I don't think anybody else can.

THE COURT: Now, in response to one of your questions in chambers, I asked counsel to warn all witnesses not to use that term unless it was directly asked. Did you so indicate?

MR. BAIN: I certainly did.

MR. BARRIS: I think this is a cool, calculated effort on the part of this man, who will stop at nothing to further prejudice Mr. Barbara. He's so smart, he's now done the very thing he didn't want to occur. But in any event, I think this is irreparable. It's something that was volunteered, and I don't know where anything else, other than a mis-trial, could cure this thing. And it's only — we've only been in this trial a day. It isn't like we've spent three weeks.

THE COURT: Would you read the question and answer back?

(Reporter reads back the question and answer)

MR. BAIN: Now, if I might respond, as your Honor well knows, in chambers I was directed to instruct Mr. Lazaros and his wife not to use the word Mafia. I did this in the witness room in the presence of Detective Aird and others. But I think Mr. Barris has purposely gone into the area. He's asked him regarding the allegation that Joe Barbara made cer-

tain pay-offs which, quite frankly, I knew nothing about prior to today. And if this allegation was made, if the question had not been answered here by Mr. Lazaros, I think, certainly, after he had gone into it, then I would have a right to ask, on re-direct, on whose behalf this money was paid. And I think, for that reason, that your Honor should not declare a mis-trial. It may be inadvertent. He has said it at this time. I think, certainly, on re-direct, after we go into this area, I would have a right to ask on whose behalf the money was paid.

MR. BARRIS: Well, your Honor, I'm sure it wasn't inadvertent. No more inadvertent than when he called me Mr. Louisell. This is a cool, calculated effort, by that man — I don't mean Mr. Bain, I wouldn't saddle Mr. Bain with this man in a million years — a cool, calculated effort to prejudice this man in the eyes of the jury. It wasn't called for at all, by an answer. All he had to do is say 'yes', 'no', or 'I don't remember.' He didn't have to come up with this word Mafia. In the first place, if he made such an allegation, it would be in connection with certain individuals, not with a group, but that's neither here nor there. I think it's as clear as my rather large proboscis that this man started out rather deliberately to inject that into the record. I'm not even sure he'd deny it if you asked him. This man is bold enough to have done it deliberately. I think he did it deliberately.

THE COURT: Anything further?

MR. BAIN: Nothing further.

THE COURT: I'm going to take the Motion under advisement. Proceed with the trial. And I caution the witness, do not mention that word again unless you are specifically asked a question which involves the necessity of so answering. Do you understand?

A. Yes, your Honor.

THE COURT: All right. Return the jury. I'll take the motion under advisement.

(Jury returns to the courtroom)

THE COURT: The last answer to the last question is stricken, and the jury is instructed to disregard it. You may proceed."

(Emphasis added)

The State asks this Court to note that, although the trial court first indicated that its chambers instruction to counsel (to relay to witnesses, which the Prosecutor did) was "not to use that term unless it was directly asked," the true ruling is stated when the judge, immediately thereafter (T. 175) instructed Lazaros not to "mention that word again *unless you are specifically asked a question which involves the necessity of so answering.*"

We have underlined two of Lazaros' answers which indicate that he understood he was asked a directly related question. He responds to defense counsel's motion for mistrial (in the *presence* of the jury) by stating: "You asked me." More significantly, *before* he answered, Lazaros [to us, in disbelief] parried defense counsel's preceding question (which, we will show, directly inveighed upon the "Mafia" area) by a question of his own: "What you mean by that? Will you explain to me?"

The point is this. Defense counsel surely knew, in addition to his knowledge from case preparation, that the witness was notoriously and repeatedly press-identified as "Peter Lazaros, self-styled Mafia money-man," and that his principal alleged (by him) connection with public officials was to "pay them off" for the Mafia. More importantly, defense counsel certainly knew that, apart from Barbara's alleged extortion-rape of Mrs. Lazaros, the only "other accusations" Lazaros (a former close associate of Barbara) made against Barbara were that Barbara made or assisted in some of these Mafia gratuities or "bribes" (the word is defense counsel's). Surely, when the area was thus deliberately invaded, the already self-discredited Lazaros did not have to incur further abasement by answering in such a way as to permit any unfair inference that Barbara (a close associate in whose company he was at the time) was paying the "bribe" on behalf of Barbara *and* Lazaros, or possibly for Lazaros himself. Trial-prosecutor Bain appears to have stressed the latter aspect of the situation, contending that had Lazaros answered the question without disclosing the actual "bribe" source, he (Bain) could have properly inquired as to the source upon re-direct examination. While we entirely agree with such position, our more basic argument (probably implicit in that of Mr. Bain) is that Lazaros' "Mafia" answer was, in the total context, quite plainly invited by defense-counsel's question.

[It is true, as belatedly then urged by the defense, that the witness could have answered yes or no. However, we find it extraordinary that the only times (three of them) that defense counsel mentioned a yes or no answer, were (like here) *after* some allegedly objectionable answer was already given. *At no time,* although the defense was faced with a rambling and recriminative (perhaps understandably) witness in the person of Mr. Lazaros, did counsel

ever request the trial court (as counsel surely well knew he properly could have done, at least after his earlier exchanges with Lazaros) to answer a question, or questions, yes or no; and then proceed to frame the questions accordingly. We urge that this is significant, particularly in the case of experienced and distinguished counsel.]

Also, it is only fair — even necesary — to consider the confusing situation of Mr. and Mrs. Lazaros as to the "Mafia" factor. Not only was Lazaros (promptly on discharge from prison) allegedly threatened by Barbara (T. 164-166) to be "called to a meeting" [a prime sample of quaint but traditional terminology meaning, "you are out of line, and are going to be taken before a council or some of the leaders"; here allegedly said in conjunction with, "whatever your wife tells you, you better forget about it"], but it also reliably appears that this unique Mafia phenomenon was a very *part of the res gestae of the alleged crime*. For some reason as to which the record is silent, the prosecution did not elicit from Mrs. Lazaros at trial, her preliminary examination testimony that on the very occasion of [immediately following] the second alleged rape, petitioner Barbara, as part of his intimidation and instructions in connection with his violation of her, and his order that she was to "do everything I tell you to do," further directed that if they were ever "called down" to a "meeting", she was not to tell anybody, not to change her "mannerism of being friends", and "to say that he never did anything to me". This proper and admissible testimony appears through four pages (52-55, morning session) of the preliminary examination transcript which is, by Michigan law, part of the file in this case.

Since Mr. Lazaros also knew of the preceding incident [Mrs. Lazaros had told him "everything"], and since he presumably knew that his wife testified to it at examination (though he was excluded from the courtroom), because he accompanied Mrs. Lazaros on the day she so testified, the confused and uncertain state of the minds of these lay witnesses is readily inferable. How could they spontaneously determine, in the setting of any seemingly (to them) Mafia-related question, whether that question "involves the necessity of so answering"? It is obtrusively plain that, to them at least, the entire crime (i.e., extortion, as charged; the contemporaneous alleged rape certainly must be assumed to be personal) *and* case were Mafia-oriented. Their impression in that respect is not without basis, because the Court will remember that Petitioner Barbara, at least allegedly, was *not* primarily interested in the several thousand dollars and jewelry Mrs. Lazaros charged him with taking on the second visit. His *first* inquiries were about the stable of race horses, the title to a place of business, and the deed to the Lazaros' home. He had *first* demanded that Mrs. Lazaros find and give these "papers" to him. We are looking at the state of mind of this Lazaros couple as they seek to determine whether a given question asked on cross-examination, "involves the necessity of so answering." With Lazaros allegedly having handled large sums of "Mafia" money over a long period of time, such ambitious property demands, though personally made by Barbara, may well have assumed a broader and organizational significance. Further substance is lent to the Lazaros' impression by Mrs. Lazaros' testimony (later stricken) at preliminary examination (pp. 37-39, appendix A) that immediately following the alleged rape and other demands on the first "visit," Barbara forced her with him to a telephone, called a number, said "I'm here" when the other party answered, then compelled Mrs.

Lazaros to take the phone, whereupon she was ordered by the other party on the line, a man, to "Stop crying," following which the man identified himself as "Tony Giacalone." All this may have been stricken by the magistrate; it may never have appeared at trial; but it obviously could not be erased from the minds of these witnesses as they sought to phrase their answers (upon cross-examination) in compliance with the aforesaid standard set by the trial judge.

As earlier indicated, only Mrs. Lazaros testified at the Preliminary Examination. However, Mr. Lazaros accompanied her, and though the defense caused him to be excluded from the courtroom (in spite of the fact that it was made clear he was not to testify in that proceeding), we should pertinently remember that the couple was almost constantly together for many months (as the defense brought out in connection with its repeated references to taxpayer-paid State Police bodyguards). In addition, they appear on the record to have been particularly close and mutually loyal. In their immediate circumstances (including mutual involvement and interest in the case), one could not suggest any more unlikely possibility than that

Mrs. Lazaros withheld from her husband the manner and details of her cross-examination by defense counsel [there, Mr. Louisell].

Respectfully referring the Court to Appendix A (transcript of the Preliminary Examination), we shall quote therefrom with appropriate page references (occasionally interpolating our comment in brackets).

[Our first quotation should be preceded by the information that, on the first day of the Preliminary Examination, Mrs. Lazaros was not only the sole witness; she also was

on the stand all day and through the evening. Except for direct examination of approximately one hour, all of that time (less recesses for lunch and dinner) was spent under cross-examination. About 9 p.m. Mrs. Lazaros became so fatigued that she appeared unable even to understand questions, let alone answer them.]

Pages 50 and 51 (of the evening session):

"Q. How long after the second visit to your home was it, before you claim he returned a third time?

A. Oh, maybe it was a week or two, I don't remember. Five days.

Q. If you said two or three days would that be wrong?

A. I don't recall because I'm so exhausted.

Q. You're pretty exhausted?

A. Yes, I am exhausted.

MR. BAIN: Let me ask, Your Honor, that we adjourn this matter. I think it's evident the witness is tired.

"Q. (Mr. Louisell) *Now this is a good time to catch you.* (Emphasis added)

A. To what.

THE COURT: Well, it's a good time when you find some people's minds have been through a lot of strain she has been on the witness stand since a quarter of ten this morning continuously. Her thinking processes do not function as they ought to and

I think that it might be appropriate that we did adjourn. *I would like you two to come up here a minute.*

MR. BAIN: *Your Honor, if you don't mind whatever we say I'd like to have it on the record.* I'm just interested in the talking about the adjournment. *There is no disrespect to your Honor. I would like to put on the record anything that is said then I won't be subjected to any of his remarks on the record.*" (Emphasis added)

Page 74C:

"Q. In addition to the ten to fifteen thousand dollars that *you say* was in the safe, *you say* you had three or four thousand dollars there? (Emphasis added)

A. Where?

Q. I'd like you to tell me, lady, *you're the one that's making up this story.*" (Emphasis added)

Page 68:

"Q. Now, have you ever been arrested and convicted of a crime?

A. No, I have never been convicted or arrested of any crime.

Q. Were you not convicted in the City of Pontiac on a charge of accosting and soliciting?

[Prosecutor's objection overruled]

A. No, I have never been arrested in the City of Pontiac or any other city in this county or any other county for soliciting, prostitution or any other thing.

Q. *That's what you say?*" (Emphasis added)

Pages 93-95:

[The subject of cross-examination here is Mrs. Lazaros' consultation at Kingsley Inn with Attorney John O'Brien, whom she called to meet her there for that purpose.]

"Q. Did you tell this story to Mr. O'Brien at Kingsley Inn?

A. Some of it.

Q. Uh-huh. *Did you tell Mr. O'Brien that you had been — that you'd had intercourse with Mr. Barbara?*

A. Isn't that an attorney-client relationship?

Q. *Are you going to rely on the attorney-client relationship?*

MR. BAIN: I think she has. I think that's all that's necessary. She's asserted the privilege.

THE WITNESS: I think that I had the right to talk to my attorney privately like most people can.

Q. (By Mr. Louisell, continuing): Is Mr. O'Brien here in Court?

A. No, he is not here in Court and I don't —

Q. *Well what did you tell Mr. O'Brien?*

MR. BAIN: Objection, Your Honor. She's indicated that's within the privilege.

THE COURT: She indicated that.

MR. LOUISELL: She hasn't claimed her privilege.

THE COURT: To my understanding she has.

MR. LOUISELL: She just asked me if it falls within the privilege. In the first place I don't believe there is any privilege in this matter.

THE WITNESS: I don't think I have to answer what I told my attorney.

Q. (By Mr. Louisell, continuing): *You don't want to answer that, is that right?*

MR. BAIN: Objection. He's arguing with her." (Emphasis added)

[The obviously critical, if not derisive, tenor or comment, implicit in at least two of the above "questions," plus counsel's contumacious persistance in boldly renewing (with impunity) the same inquiry after adverse ruling by the Court, quite plainly had more than later (at trial) impact upon Mrs. Lazaros. (Understandably, we submit, she came to the trial on edge with a deep resentment deliberately provoked by defense counsel for later exploitation.) At the Preliminary Examination, she appears to have been quite cowed by the preceding episode. Certainly it is significant that the same lady who "successfully" invoked her attorney-client privilege, thereafter proceeded (over many succeeding pages of the record) submissively to answer a complete cross-examination as to details of her professional consultations with four other attorneys. Although defense counsel reviewed the "O'Brien" business at length (pages 7a-21a), and won concession that Mrs.

Lazaros had to disclose what was told Mr. O'Brien in the presence of Mr. Lazaros and/or the State Police, the several colloquies of counsel and rulings of the Court served only to make it all the clearer that she was not obliged to reveal *any* private consultation. Despite this, and although neither Mr. Lazaros nor any police officer (or other person) was present when she consulted the later attorneys, Mrs. Lazaros simply capitulated. She answered everything that was asked. Certainly, if she reached the conclusion that the attorney-client privilege was not worth the trouble and embarrassment of its invocation, one cannot censure her. For, after the O'Brien consultation had been completely (and judicially) resolved as above mentioned, defense counsel contumaciously (and once more with impunity) besieged her again with it as follows (29a):

"Q. In any event he was a person in whom you had great confidence, wasn't he?

A. Was he a person—

Q. In whom you had great confidence?

A. Yes, I did.

Q. And you had confidence in his reliability and in his integrity, is that right?

A. Yes, I did.

[Q. *You never told him anything of this story, did you?* (Emphasis added)]

Page 49a:

[In the presence of Mrs. Lazaros on the stand.]

"Mr. Louisell: *Let this court find out what's been going on in an attempt to frame this man.* Let the court find out." (Emphasis added)

Page 87a:

[In the presence of Mrs. Lazaros.]

THE COURT: And counsel, Mr. Bain, has stipulated that it has been told to them several times.

MR. LOUISELL: Is he under oath?

THE COURT: No, but I'm certain that if you cannot accept the word of Mr. Bain as Prosecuting Attorney for this matter, we are getting in kind of a bad area.

MR. LOUISELL: *Well, Judge, there's this problem. You see, Mr. Bain has acted in several capacities in this case . . .*" (Emphasis added)

Page 113a:

"MR. BAIN: I wonder if counsel might be instructed to *quit yelling* at the witness." (Emphasis added)

[No comment by court or exception by Mr. Louisell.]

Page 114a:

"MR. BAIN: Your Honor, *Counsel is arguing* with the witness." (Emphasis added)

[No comment by court or exception by Mr. Louisell.]

Page 27 (evening session):

"Q. Would you tell us today Mrs. Lazaros that you know of no basis of any ill-feeling between you and Mr. Albert?

A. I'm not — am I supposed to be here to testify against Mr. Albert?

Q. *I don't know what you're here for.*" (Emphasis added)

Page 36 (evening session):

[Mrs. Lazaros finally wearies after interminable questions about her confidential disclosures to numerous attorneys. With the exception of the earlier Attorney O'Brien episode, she has answered everything asked. Now, when defense counsel starts with the same question, namely whether she told Attorney Franklin "the *story* that you told here today," she demurs and declines to answer, making it transparently clear upon the record that she does so because the matter inquired about was a confidential disclosure to Attorney Franklin within the attorney-client relationship. Again, and plainly for no other purpose than the embarrassment, discomfiture, and/or agitation of the witness (because everything truly *was* on the record) defense counsel imposes.]

"Q. *So you're declining to answer the questions with respect to Mr. Franklin invoking your attorney-client privileges?* (Emphasis added)

A. I certainly do.

MR. BAIN: I think she has it on the record that she is invoking it and that is all that is necessary.

MR. LOUISELL: *I need it on the record.*

MR. BAIN: *It's on the record.*

THE COURT: That is all that is necessary.

MR. LOUISELL: *I do need it on the record.*

Q. (Mr. Louisell continuing): *You're invoking your client-attorney privileges?*

A. I most certainly did.

Q. *I just wanted it on the record.*

THE COURT: It's *on* the record." (Emphasis added)

[Nothing changed in the treatment of the witness. Defense counsel, immediately after the above, again asked Mrs. Lazaros, this time with respect to Attorney Crona, whether she told him "the *story* that you *told* on direct examination here today". (Emphasis added). The same question, *verbatim*, was next asked her with respect to Attorney Finn (the last of a number of attorneys consulted in an effort to win Mr. Lazaros' release from conviction-imprisonment).]

Page 44C:

"Q. Is there something different that occurred on that occasion that you told us about two weeks ago?

A. Two weeks ago I didn't discuss it.

Q. *Well, I think that you did, Mrs. Lazaros.*" (Emphasis added)

Pages 55 and 56 (evening session):

"Q. When you were driving to Jackson Prison with Mr. Albert, were you alone?

A. No I was not.

[Again, after a full page of testimony.]

Q. Were there occasions when you went to Jackson Prison with *Mr. Albert* when the two of you were alone?

A. I have never gone alone riding down to Jackson Prison with *Mr. Albert.*" (Emphasis added)

Page 84C:

"MR BAIN: I'd like to request Mr. Louisell *ask a question and then give the witness a chance to answer and not start an argument.*" (Emphasis added)

[No comment by the court or exception by Mr. Louisell]

As always, perhaps unfortunately, it will take a deliberate and comprehensive reading of the entire transcript of the Preliminary Examination in order to reach some realization of the inevitable erosive effect of her cross-examination upon Mrs. Lazaros (and, through her, Mr. Lazaros), and upon her reservoir of forbearance which was scarcely limitless under the circumstances. For example, over the space of less than a page of the transcript (74, 75; first morning session), defense counsel *seven times* uses, as a key phrase in questions, the words, "telling your story" or "told your story." On top of this, the cold record is powerless to communicate the facial expression, the manner, the gesture, the tone and other

possibly critical factors which served to heighten the provocative thrust of what we have here quoted. All things considered, Mrs. Lazaros' patience brought her through the Preliminary Examination reasonably well, with only occasional and minor lapses from restraint. We respectfully urge, however, that just as her mind and body were then entirely "exhausted," her self-control in the total case situation was nearly so. The defense plan of cross-examination had already been successful. Mrs. Lazaros and, through her, the volatile Mr. Lazaros, were "ready for trial." Once the trial started, their festering indignation against the defense technique of ridicule, made them quick and easy prey.

* * * *

Our quotations from the trial record are extensive. Except for occasional comment in brackets, we shall simply offer them seriatim. We will not, however, necessarily proceed chronologically in order of the pages of the transcript.

* * * *

Mr. Lazaros

To some extent we have already presented certain demeaning questions and comments directed by defense counsel to this witness. We have also, we believe, demonstrated that the question which elicited the "Mafia" reference was, whether or not deliberately designed to do so, *so composed* [i.e., in the context of Mr. Lazaros' publicized claims, *and* counsel's knowledge of those claims in general and of The Kingsley (December, 1967) incident in particular] as inevitably to produce the answer given. The

witness' only other alternatives were either to deny under oath what he had theretofore consistently sworn to before other public agencies, *or,* while admitting the bribe payments, to withhold the name of the alleged *source* of the bribes, thus leaving a substantial inference (even if he said, "on behalf of other parties") that the monies were paid on behalf of Barbara (his admitted associate at the time) and/or himself. Such self-immolation, adding injury to the insult of the ridicule-intended question, cannot fairly be exacted of a witness, even under the "constitutional" cloak of according defendant his fair ("but not perfect") trial. It is plain, as we suggested earlier, that Lazaros first inquired to be sure of the incident intended by the cross-examiner's question, then (T. 172): "You asked me."] determined (apparently erroneously in the view of the trial judge) that the mention of "Mafia" was necessarily involved in the question asked," and thereafter sought to answer the question accordingly. Let us look at the situation conversely. Was it fair for defense counsel, after having the Court ban mention of "Mafia" (in the form of the instruction given), then to exploit the ban to the disadvantage and embarrassment of the witness, by *deliberately inquiring* as to a bribe incident of which counsel *knew* the "Mafia" was (in the mind of the witness) the most important (and "necessarily involved") part? More to our point here, in all the circumstances, could counsel *reasonably* have expected any other kind of answer from this witness? We urge again that, intentionally or otherwise, counsel's question *invited* the answer it received.

Before proceeding to further significant quotations from the trial transcript, we respectfully ask the Court to note, on the *entire* record of Lazaros' testimony, how repeatedly the witness was encouraged to rambling and/or unresponsive answers by counsel's comments (instead of substantive

questions) such as, "Are you through?"; "All right"; "All right, go ahead"; "Is that right?"; etc. At one point (later quoted herein) *shortly after* the early (and single) "Mafia" reference, counsel allowed the witness to ramble for almost four pages of the transcript, in answer to various questions, and then objected to the Court that whereas all he was seeking was a simple answer to his very *first* question, what he was getting was a *lot of hearsay*. We urge that the effect of such "questions" and incidents, was to create an accepted pattern of looseness and unresponsiveness. This is very significant in our view, because it is after that point in the record, that virtually all of the allegedly unresponsive and prejudicial answers occur.

We now proceed to quote from the trial record [in addition to the episode of the four-plus pages of irrelevant answers which counsel permitted and pursued at length, then characterized as "hearsay"] insulted the witness for no other reason than apparently to provoke him; (admittedly) elicited responsive answers, only to assail the witness for giving them; again and again, either recklessly or deliberately, invaded the danger-fraught "bribe" area; invited the witness to say more, after the witness had already said that his (Lazaros') credibility was better than that of counsel or the defendant; and ordered the witness to re-examine an exhibit which he had already examined. Suggesting, accordingly, that the (sometimes) shambles of the Peter Lazaros cross-examination were in large measure contributed to, if not induced by, defense counsel, we quote the incidents (not necessarily in chronological order) as follows:

T. 185:

"Q. *You'd do anything* that would serve your purpose *at any time*, wouldn't you, Mr. Lazaros, if you thought it would further your ends, isn't that true?

A. Well, let me tell you something, Mr. Barris, I'm trying to answer your questions the best way I know how. *If you're going to start insulting me* — I just said to you that if I had to bribe somebody to do Barbara a favor, I would do it." (Emphasis added)

T. 187:

"A. No, they told me it could be a heart problem, but then they found out that I had a sugar diabetes attack.

Q. You mean you were *suffering from prisonitis*, was it not?

A. Now you are argumentative with me.

MR. BAIN: Objection.

THE COURT: Objection sustained." (Emphasis added)

T. 176:

"Q. In other words, *you, at your stage in life, now decided to be a pillar of the community*, is that correct?" (Emphasis added)

T. 170, 171:

"Q. You do keep in touch with your attorney, do you not, *the latest of a whole list of them?*

A. I don't like your insinuation, Mr. Barris.

MR. BAIN: Objection, your Honor—

THE COURT: Objection sustained." (Emphasis added)

T. 169:

"Q. Now, you weren't exonerated by that Order, were you?

A. I don't know what the word exonerated means.

Q. *I should think you don't.* But in any event, Mr. Lazaros, you know that the matter was remanded back for a new trial?" (Emphasis added)

T. 204:

"Q. Now, you had a *whole succession of lawyers* from time to time, did you not?

A. *Just a minute, just a minute, Mr. Barris, you're using the word succession, I had lawyers.*" (Emphasis added)

T. 233, 234:

"Q. You even remember what your answer was, without even looking at this?

A. That's right, because I got a good memory, Mr. Barris.

Q. *You didn't have one about two minutes ago.*

THE COURT: *Proceed without drguing with the witness.*" (Emphasis added)

T. 198:

"A. I haven't filed because your client stole lots of those records out of my house, plus —

Q. You were there when my client stole the records?

A. That's only my information, sir. I was in prison, you know that.

Q. In other words, it was hearsay; is that right?

A. *Somebody told me. Look, Mr. Barris,* I'd like to say this to you, like to say this to the Court and to the jury, *I don't want to be argumentgl with you, I'm here to tell the truth, not to argue with you.*" (Emphasis added)

T. 234:

"Q. Let me finish the question, 'Do you recall that?' 'A. Yes, I seen it in the paper. I wasn't in the courtroom. Q. I see, do you have any knowledge of this $15,000 in cash and/or securities? A. Wasn't no cash or securities, I don't know.' Now, were you telling the truth?

A. I'm just telling you what I said yesterday and I'm saying that today, we never established what it was.

Q. Did you make this answer under oath?

A. Look we're here on extortion, we're not here on a bill that's already been paid, Mr. Barris. Let's get to the facts of this case.

Q. *We're here to test your credibility.*

A. My credibility is better than yours, and better than that thing there.

Q. *Go ahead, do you have anything more to shoot your mouth off about?*" (Emphasis added)

T. 201, 202:

"Q. All right, but you were sued before you paid it, isn't that right? You were sued in the Circuit Court for the County of Oakland, in a case assigned to Honorable Judge Templin? You were sued?

A. I'm not denying that. As I said to you before, being in business, you can be sued at any time. I've sued lots of people, too.

Q. *Uh-huh.* Now, all this time you had, as I understand, when you went to Jackson, as much as $15,000 in cash, maybe more, plus a lot of securities, is that correct?" (Emphasis added)

T. 202:

"A. I never had depositions with Mr. Finn representing me at my house.

Q. *Is that right?*

A. I don't remember anyway.

Q. *Uh-huh.* All right, now I want to ask you if you remember these questions being put to you by Mr. Warren, and Mr. Finn being right there—" (Emphasis added)

T. 168:

"Q. Who were your body guards, *at tax payers' expense,* last week?

A. I wouldn't call them body guards, sir.

Q. What would you call them?

A. I would call them law enforcement officers that are out to protect me from these people.

Q. *All right, now, we'll use your language, Mr. Lazaros, we'll play the game according to your rules* —

A. You know my rules, you've been living with my kind of people all your life, so you should know.

Q. *Are you through?*

A. Yes, I am." (Emphasis added)

T. 188:

"Q. Now, *Mr. Barbara* — excuse me, I'm sorry, Mr. Lazaros, how long were you at the Deaconess Hospital?" (Emphasis added)

T. 205:

"Q. Ok, now, were you ever present when your wife indicated, in your presence, to Mr. Phillos, that if Mr. Adell made any effort to go to the Prosecutor or take certain checks to the public officials, she was going to claim that Mr. Adell had raped her?

A. Let me tell you something, Mr. Barris, *I'm trying to answer you calmly and nice,* even though after nine months what I've gone through; you know that is a lie and you're talking about Phillos, if you're talking about Phillos that he had nine wives in a period

of a year and-a-half, I want you to clarify that, is that the Phillos you're talking about?

Q. *Did he have them consecutively or concurrently?*

A. I don't know. He had nine wives in a period of a year and-a-half.

Q. *The punishment for nine wives — go ahead.*" (Emphasis added)

T. 241, 242:

"Q. Mr. Lazaros, you and your wife were separated on occasion during your marriage, weren't you?

A. That's a lie.

Q. Absolute lie?

A. She filed for divorce, but we were never separated.

Q. She's *petrified of you*, isn't she? She's afraid of you?

A. Let me tell you something, Mr. Barris, *you're going to ask me these questions like a gentleman.* Look, I'm fighting for my life, and I don't care what you say to me, but I love my wife and I love my kid.

Q. You've beat her up on occasion?

A. You're a liar. Whoever tells you that — my life is in danger today. And I love my wife.

THE COURT: Proceed by question and answer.

MR. BARRIS: I do, your Honor. I can't stop this man, nobody has been able to.

A. *You're insulting me.* I love my wife and I love my retarded kid, that he put back three years.

THE COURT: Listen to the questions, answer the questions and proceed from there." (Emphasis added)

T. 189:

"Q. Did you speak to him [Barbara] at that time?

A. Yes. He walked up to me, they had me in the hallway there because they couldn't get no room, and he says to me, 'Don't worry about it, Pete, Mr. Rogers in New York already got the Supreme Court Justice Abe Fortas taking care of it.'

Q. *All right, so you're suggesting now that Mr. Rogers had some sort of in with Justice Fortas, is that right?*

MR. BAIN: *Objection, he's not suggesting anything, he's responded to the question, he's responded with what Mr. Barbara allegedly told him.*

MR. BARRIS: *I think that's right*, your Honor, I'll withdraw the question." (Emphasis added)

T. 191, 192:

"A. I wouldn't say from time to time. At one time, the last time that I ever heard of Mr. Barbara, was when my wife said that Mr. Rogers was in Detroit, and that Mr. Barbara, with Mr. Rogers and a Mr. Scott, John Scott, that they were going to — they had it all set up again with T. John Lesinski.

Q. *Now, you're suggesting that Judge Lesinski—*

A. *I do not suggest.*

MR. BAIN: *Objection.*

THE COURT: *Objection sustained, rephrase your question.*

MR. BARRIS: Fine, your Honor.

Q. *Now, all right, I'll ask you pointblank, do you have any knowledge that anybody was making a pay-off to Judge John Lesinski?*

MR. BAIN: *Objection, no* proper foundation.

THE COURT: *Objection sustained.*" (Emphasis added)

T. 192, 193:

"Q. So by your calculation, the last you heard of any efforts on your behalf by Mr. Barbara was this conversation involving Mr. Scott, which occurred one to two months after you went to jail?

A. I didn't say that. What I said to you, in that period.

Q. Well, what I'm trying to find out is when the last time — well, strike that — *when was the conversation involving Mr. John Scott and his Honor, Judge Lesinski?*" (Emphasis added)

T. 239, 240:

"Q. Now, sir, do you remember a time when Mr. Phillos went over to the State Police and made a written statement concerning what he knew about a supposed attempted to bribe then Prosecutor Bronson?

A. Just a minute, Mr. Barris, if you're going to tell the facts to this Court, to the jury, you might say it to the jury right.

Q. Do you remember that?

A. If they're lying to you outside, I might as well tell you the facts. I remember that Mr. Phillos came to my house, and he requested that we call the State Police. And the State Police was present, Mr. Jack Bain was present, and a court reporter was present, and he give a statement.

Q. Do you remember that one statement was given by him, and that he then recanted it, and that you spoke to him in Greek, right in the presence of Mr. Aird?

A. No, you want to know—I only talked to him in Greek two words, he asked me, if you want to know, Mr. Barris, 'Should I tell them about the $22,000 you give Mr. Bronson?' And I says, 'You go ahead and tell him the truth.' And another thing, Mr. Barris, Mr. Phillos had come up to me in the presence of other people, that we have tape recordings of it, that Mr. Phillos said that he's been threatened by these people. He's been threatened by the Prosecutor's Office in Detroit, unless he comes down and signs a warrant against me, that they would do something to him. And we have tape recordings to that, not only statements; and not only that, we have witnesses, honorable witnesses.

Q. Who are these honorable witnesses?

A. They will be called in.

Q. Well, name them.

A. I don't have to name them to you at this time.

MR. BARRIS: Well, your Honor, I ask, since he brought this up, that he—

THE COURT: *What does that have to do with the trial of this cause?*" (Emphasis added)

T. 184, 185:

"Q. Did you get any money from anybody to arrange for that extension of time?

A. I was getting to that, Mr. Barris. It cost me a thousand dollars out of my own pocket.

Q. Who did you pay?

A. I paid John Klaus.

Q. *You mean you paid it under the table.*

A. I give him a thousand dollars.

Q. Why?

A. For the favor.

Q. *To bribe, an agent of another?*" (Emphasis added)

T. 243:

"Q. I'm sure you recognize her handwriting then, do you not?

A. Yes, but I know you kind of people, you're very good experts on that.

Q. *All right.*

A. I live with you people.

Q. *You don't live with me.*

A. You represented me, I know your kind.

MR. BARRIS: Well, your Honor, I don't think I have to take this kind of abuse.

A. That's not my wife's signature.

Q. You deny that's your wife's signature?

A. It doesn't look like my wife's signature.

Q. *You look at it again, you're under oath.*

A. I looked at it once, I know I'm under oath. *I don't have to take your orders.* I'm not in Greek-town here." (Emphasis added)

T. 180-184:

"Q. All right, go ahead. *Tell us then, did you intervene on behalf of Mr. Barbara, to secure an extension of that loan?*

A. At the time, that loan was the kind of loan that he had — if the loan was to be called in, Mr. Barbara had 60 days to make the loan good.

Q. *All right:*

A. But, Mr. Barbara and his uncle, Mr. Vitale, Paul Vitale, had come up to me and they had begged me, if I could — because they knew that I knew the people that they work for John Kales — if they could get an extension to make payments on the $88,000 loan, due to the fact that they were about ready to go out of business. And if Mr. Kales would call that $88,000 loan back, it would necessarily put them out of business. Then, I contacted a Mr. John Klaus.

Q. Who is Mr. John Klaus?

A. Mr. John Klaus, at the time, I don't know if he is yet or any more, was a Vice President for a bank out of Indianapolis, Indiana, the Morris Plant Bank, and they had a branch here of a loan company, or finance company, I'll tell you the name in a minute. And I asked him, I says, 'Could you do me a favor?' I says, 'Joe Barbara is a friend of mine, Mr. Vitale is a friend of mine, would you try and give these people a little time to pay it, because if John Kales calls in the loan for the $88,000 or thereabouts, that would put them in a bad position.' He says to me, 'Pete, for you, I will do it.'

Q. Who is this, John Klaus?

A. That is right, 'I will try.'

Q. What was Mr. Klaus' relationship with Industrial Finance?

A. He used to work there, but the same time, as I explained to you before, Mr. Barris, he had quit from there and he had his own company, he was Vice President for another company. And he explained to me that if Mr. Kales don't want to give Mr. Barbara

an extension for the $88,000, that he would buy the contract and hold it himself, through his company. Then Mr. Klaus come back to me and says, "I don't think that Industrial Finance, they want to keep on going, because," he says, 'one of Mr. Barbara's close friends from a company owned and operated by the same people,' he says, 'they have better experience, because they just beat that company for a million and-a-half dollars. And,' he says, 'Mr. Kales, he's about to go out of business, because he dealt with these people. And he don't want no more to do with Tri-County.'

Q. Now, is this Mr. Kales, John Kales or Bob Kales, that you're speaking of?

A. I believe it's John Kales.

Q. Are you sure of that?

A. I'm not positive of the first name.

Q. Let me ask you this, what was the title of Mr. Kales, the gentleman, whom you're referring to?

A. My information was, and is, Mr. Barris, that Mr. Kales is from the Kales family, from Whitehead and Kales, in the industrial business, and they own the Kales Building in Detroit. And that's all I can tell you, as far as Mr. Kales in concerned.

Q. Did you ever speak personally with Mr. Kales about this loan?

A. No, sir.

Q. You spoke only to Mr. Klaus?

A. That's right, sir.

Q. Mr. Klaus, as I understand, was not any longer with Industrial Finance Company when you spoke to him?

A. But he had influence with Mr. Kales, because they work close together. One would buy the other's contracts and things like that.

Q. Did you ever tell Mr. Barbara, at any time, that you personally called Mr. Kales and it was through your influence that an extension of this loan was obtained?

A. No, sir.

Q. You deny making that statement to Mr. Barbara?

A. That's right.

Q. You deny having spoken to Mr. Robert Kales or John Kales concerning the extension of this loan?

A. That's right.

Q. And your only contact, in an effort to get this loan extended, was with Mr. John Klaus, is that right?

A. Plus—I was getting to that, Mr. Barris, if you let me, I will explain to you. Plus, I've talked to Mr. Hudnut, which he was my attorney at that time. And I pleaded with him if he could get Mr. Barbara another source to take over the $88,000 so he don't have to go out of business. I got an eight months extension at the time. Now, the same time, Mr. Klaus says to me, 'I have a company,' that their offices, if my recollection is right, they are somewhere on Livernois, Building Trades, or something like that, it's a loan company, anyway, and Mr. Klaus has introduced Mr. Barbara to the president or one of the people involved

with that company. And then Mr. Klaus came back one day and he says to me, 'I took Mr. Barbara over there to try and get $88,000, but instead of that, he says, 'what he's doing, he put in an application for $250,000. So,' he says, 'Pete,' he says, 'I don't think this man is trying just to get out of problems, he's trying to borrow enough money because he knows he's going to go out of business.' I said to him, 'Don't prejudge him, maybe he needs some operating capital in order to survive.' Well, anyway, that loan was turned down because the people—this is only my information, nothing of my personal knowledge—

MR. BARRIS: *Your Honor, this is obviously hearsay, and my question is, Mr. Lazaros, what, if any, steps you took to get an extension of this $88,000 loan. That's all I'm interested in.''* (Emphasis added)

We add one final transcript quotation for another but relevant purpose. The Oakland County Assistant Prosecutor argued (on appeal in Michigan) that the trial record demonstrated that the witnesses Lazaros could have been controlled by defense counsel if he had so desired. In this connection, we have in mind [in addition to our previously mentioned point that even after a certain rambling and unresponsive answer-pattern emerged, defense counsel never sought the aid of the trial court in directing yes-no answers to questions properly put for that purpose; instead, after eliciting (if not inviting) answers that were at least partially unresponsive, counsel either passed (most of the time) the incident entirely, or objected (just a few times; *only* when the unresponsive material did not suit him) *belatedly* that the question could have been answered yes or no; moreover counsel made virtually no use of control-setting motions to strike], the further argument that the (trial) Assistant Prosecutor established that Lazaros *could*

not only be controlled, but very readily controlled. Conceding that, in the circumstances of the case, Lazaros was strongly prosecution-disposed, and therefore more receptive to prosecution control, we are nevertheless impressed by the quickness, curtness and effectiveness, which appear from the following (T. 210):

> "Q. Mr. Barris suggested that you might be testifying here as a result of your case which is pending. You've testified in a number of other matters, other than this one, is that correct?
>
> A. Yes.
>
> Q. Or at least talked to various police agencies about them?
>
> A. As I said, Mr. Bain, after what happened to my wife—
>
> Q. *Just answer my questions.*
>
> A. *Yes.*" (Emphasis added)

Thus, we respectfully urge that counsel's calculatedly insulting (hence, unfairly provocative) questioning of Mr. Lazaros, plus his seine-fishing tactic (or, at least, effect) in repeatedly allowing (indeed, sometimes encouraging, the witness to answer (and even argue) errantly and unresponsively (objecting only rarely, when the answer disserved the Petitioner); plus also his reckless and repeated invasion of the "Mafia"-oriented bribe area [it is remarkable that Lazaros did not mention the word many more times than once], makes him largely responsible for any alleged prejudice that might have *survived* the prompt and firm instructions of the trial court. Counsel, if he did not invite such answers, clearly chose to risk them.

In order, however, for the Court to reverse the District Court, it is of course not necessary to find the defense itself *largely* responsible as the State suggests. Rather, if *upon the entire record,* there is presented here a situation of doubt or question as to *who* was responsible, then Petitioner, with his burden of proof ("clear and convincing") in habeas corpus, has quite as conclusively (i.e., under the law) failed to offer here the requisite "clear" case wherein the Court is constitutionally constrained to exercise its extraordinary power of overturning a presumptively valid state court conviction. However often and emphatically reiterated by Petitioner [i.e., by citing cases (and even those inapposite upon their facts) of *direct appeals* of state and federal criminal convictions], the posture of Petitioner before *this* Court is *not* that of a *defendant* presumed to be innocent.

The supposed legal precedents relied upon below by the Petitioner, with the exception of their ringing asseveration of the constitutional right to fair trial, are quite inapplicable here. Just how has Petitioner shown irreparable prejudice to him through the "Mafia" allusion? *Where* did the *counsel-sought* "bribery" prejudice to Petitioner leave off, and "Mafia" prejudice begin; and *what* has Petitioner offered the Court to assist it in the impossible determination of such a refinement? Surely, "Mafia" imports (arguendo) no more than criminality. Does it *add* anything to the deeply offensive *crime* of bribe-induced seduction of high officials from their oath and duties in the public trust? If so, *what,* and *how much,* and *where or when* does that addendum enter the prejudice-composite?

And, as the Court will note from Petitioner's case authorities cited below, all appear to concern instances of prejudicial answers of persons *directly* identified with

law-enforcement and/or prosecution (e.g., police officer witnesses).

That the latter circumstance is a material, if not necessary, factor in the course of decision of these (still direct appeal) cases, was plainly indicated by the Court in *United States v. Matthew Rubino* 431 F.2d 284 at 288-289 (6 Cir. 1970):

> "*In the present case, where it is not shown that the newspaper stories came through or from the prosecution,* it is our opinion that the burden of establishing that he has been treated unfairly rests upon Rubino. Marshall v. U.S., 355 F.2d. 999, 1007 (9th Cir.), cert. denied, 385 U.S. 815, rehearing denied, 385 U.S. 964. *Rubino, in our opinion, has made no such showing in the record in the present case.*" (Emphasis added)
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> "*There is no contention that any of this publicity was generated by a representative of the United States.* To the contrary the release of this publicity was beyond the control of the United States Attorney and United States District Judge who presided over the trial in the present case." (Emphasis added)

Another ruling of the Court in *Rubino* would appear to have particular pertinency in the circumstances of the case at bar (at 289):

> "*In the absence of affirmative evidence* of deprivation of a fair trial, *we decline to establish a precedent which conceivably could permit counsel, purposely or otherwise, to obtain* unfavorable publicity concerning himself in a local newspaper," [Here, the

obtaining of a prejudicial answer by a calculatedly provocative and "loaded" question, directed to an already antagonized witness in a *known* precarious area] "and *thereby make it virtually impossible for a valid conviction to be effected* against one of his clients in an unrelated case." (Emphasis added)

It is, however, the reasoning of the Ninth Circuit in (another direct appeal) *United States v. Ruby Lazarus* (April, 1970), 425 F.2d 638, which strikes closest analogy to our above argument that, since defense counsel's very question here imputed the twice-committed *crime* of *bribing* public officials, to his client Barbara (and counsel *knew* the witness would affirm his earlier accusations), the omission of "Mafia" from the witness' answer would scarcely have served to lift the heavy incubus of *criminality* from the defendant. For, the jury either accepted this witness or rejected him. Merely *because* defense counsel was hopefully proceeding on the ridicule-implied basis of reductio ad absurdum, it is simply fatuous to suggest that the jury *would not* believe the detestable briberies, but *would* believe the "Mafia" allusion, particularly when the two were inextricably linked in the witness' answer that the bribes were "representing the Mafia."

In the Ninth Circuit's *Lazarus,* supra, the latter had been convicted of perjury before a Federal grand jury investigating "syndicated gambling activities." At trial, the Government called a former United States Attorney as its witness to establish the materiality of Lazaros' testimony to the grand jury investigation. That investigation principally concerned a 1965 Palm Springs, California, meeting of "members of an alleged gambling syndicate." The Government's aforesaid trial witness stated that the meeting "*involved* people who were reputedly very high up in the Mafia organized crime syndicate in this country."

We grant, indeed expressly note, that the Ninth Circuit, inter alia, spoke as follows:

> "Although reference to the Mafia was by no means necessary to the proof of the materiality issue, it was not wholly irrelevant to the inquiry. *Part* of the information spread before the grand jury was a claimed link between the members of the Palm Springs meeting and the Mafia."

It is the other "part" of the information before the grand jury, however, which interests this Respondent, because it was critical to the Ninth Circuit's final disposition of the "Mafia" issue. That other "part" included information (some of it set forth in a half-page of the opinion) tending to connect the members of the meeting, including Lazaros, with a highly organized and syndicated gambling operation that was not only interstate but international. In addition, as the opinion states, "the activities of those who attended the meeting may have violated several federal statutes." In other words, quite apart from the "unnecessary" reference to the Mafia, the grand jury "information" *properly* summarized by the witness to the jury at trial, legitimately tended to identify the defendant and others with the commission of state and federal crimes.

It is in such a setting that the following language of the Ninth Circuit's opinion comes to us here, we submit, with a special significance. We quote (p. 641):

> "There well may be cases where reference in testimony linking the defendant to the Mafia, may require the granting of the defendant's motion for a mistrial. But this case is not such a case. The context of

Lazarus' testimony was an investigation of organized crime and racketeering. The reference to the Mafia was made in that context. The public has long been exposed to extensive publicity about the evils of organized crime. We have no reason to suppose that publicity about the evils of the Mafia has been more extensive or more virulent than that devoted to members of organized crime who are not Mafia associates. We likewise have no reason to suppose that the public has less hatred toward big-time racketeers who are not members of the Mafia than it has toward those who are. *We cannot say that the omission of any reference to the Mafia would have perceptibly brightened the jury's image of Lazarus or his associates. Moreover, nothing in the later developments at the trial points unerringly to undue prejudice to Lazarus that could be attributed to the unfortunate mention of the Mafia. We hold that the mention of the Mafia did not deprive Lazarus of a fair trial and that the district court did not abuse its discretion in denying his motion for a mistrial.* (Cf. People v. Curtis, (1965) 232 Cal. App. 2d 859, 43 Cal. Rptr. 286)." (Emphasis added)

CONCLUSION AND PRAYER

For the aforegoing reasons, the State contends that the interjection by witnesses Peter and Delores Lazaros of extraneous matters in the presence of the jury, in response to questions asked by defense counsel upon cross-examination did not deprive the petitioner of a fair trial.

Wherefore, for the aforegoing reasons, as well as the reasons so well-stated by Judge Fitzgerald in *People v. Joseph Barbara, Jr.* (1970), 23 Mich App 540, and in the

opinion of the United States Court of Appeals, the State most respectfully prays that Certiorari be denied.

Respectfully submitted

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January 15, 1972